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Supreme Court, U.S.
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No. 02-1250

IN THE

Supreme Court of the United States

HEALTHGRADES.COM, INC.,

Petitioner,

v.

NORTHWEST HEALTHCARE ALLIANCE, INC. d/b/a ASSURED HOME HEALTH & HOSPICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner has quite misleadingly framed its issue. More correctly, the question presented in its Petition is as follows:

> Should this Court review a case in which, in an unpublished opinion, the Ninth Circuit applied the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783, 788-90 (1984), to specific facts and determined that personal jurisdiction could be exercised over Petitioner?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Northwest Healthcare Alliance, Inc. d/b/a Assured Home Health & Hospice, is a wholly-owned subsidiary of Assured Capital Partners, Inc., a Nevada corporation. No publicly held company owns 10% or more of the stock of Assured Capital Partners, Inc.

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STATEMENT OF THE CASE AND CLARIFICATION OF RECORD

Petitioner's Statement of the Case (1) is incomplete, omitting undisputed material facts; (2) misstates Assured's position; and (3) suggests inferences that are misleading and, in fact, irrelevant.

Since the Ninth Circuit's Opinion was not for publication, it did not include a complete exposition of the Record facts [Petition Appendix p. 2]. The undisputed material facts bear repeating.

Petitioner is a corporation with offices in Lakewood, Colorado. Petitioner created and maintains a website at the URL http://www.healthgrades.com. Respondent, Northwest Healthcare Alliance, Inc. d/b/a Assured Home Health & Hospice ("Assured"), is a Washington corporation which provides Medicare-certified home healthcare services in three rural Washington counties. By Washington state law, it is prohibited from providing these services anywhere else.[1]

As its service denomination suggests, Assured's services at issue in this lawsuit are provided to its patient-clients in their homes. It is, therefore, the quintessential local business.

As a Medicare-certified home healthcare agency, Assured is surveyed by Washington State Department of Health surveyors on a routine basis. If the surveyors determine that

1. Washington allocates certain healthcare services under a Certificate of Need program. The Washington State Department of Health has licensed Assured to provide Medicare-certified home healthcare services in Lewis, Thurston and Mason Counties [9th Cir. ER 000009, 204].

a Medicare-certified home healthcare agency is out of compliance with Medicare regulations, a notice of deficiency, indicating the out-of-compliance issue, is given to the home healthcare provider. [9th Cir. ER 000258-59.]

The Washington State Department of Health surveyors use the data generated by the surveys in the state's Medicaid program and provide the federal government's Medicare program with the same information. The data is public information.

Petitioner, in its website, advertises a number of services and provides a variety of information. The portion of its website which is at issue here is a section wherein it purports to provide "comprehensive healthcare ratings to consumers to help them make the most informed decisions regarding their healthcare." [9th Cir. ER 000126.] Since more than 8,000 home health agencies across the United States are rated [9th Cir. ER 000021], a visitor to the Healthgrades website who desires to obtain information about Medicare-certified home healthcare agencies in his or her particular locale must enter a geographic locator, typically a zip code or city [Petition Appendix p. 7]. The visitor will then be given the names of home healthcare agencies providing services within that particular geographic area. If the visitor delves further into the site he or she will be given "rating" information on the agency he or she is investigating [9th Cir. ER 000089-96].

The dispute in this matter relates to the rating or grading of Respondent's Medicare-certified home healthcare agency by Petitioner. Respondent claims that the ratings are defamatory and violate Washington's Consumer Protection Act, RCW 19.86.020, as an unfair or deceptive act or

practice – providing Washington consumers with false or misleading information.[2] Assured's dispute with Petitioner's use of the data is in its effort to rate one home healthcare provider versus another by using data in an inappropriate fashion, not with the data itself. In other words, it is the application of that data to a use for which it was not intended and does not work that is the gravamen of Respondent's complaint.

A key fact, for purposes of evaluating the jurisdictional issues in this matter, is that Petitioner has sorted the information on the Medicare-certified home health agencies on a state-by-state basis [9th Cir. ER 000021-22, 258] using a proprietary algorithm and certain scoring protocols. Petitioner ranked Assured against other Medicare-certified home healthcare agencies only in Washington state. In essence, the ranking was based on the number of deficiencies reported in the last survey period and over a preceding period of time. There was no effort to evaluate the deficiencies' severity [9th Cir. ER 000258-260]. Each Medicare-certified home healthcare agency in Washington state was then rated above average, average, or below average, in comparison with other Washington state agencies, depending essentially on the number of deficiencies reported by the Washington State Department of Health surveyors.

As the Ninth Circuit observed, Petitioner was well aware that its ratings of Washington Medicare-certified home healthcare providers would be of value primarily to Washington consumers since local home health services

2. RCW 19.86.020 is Washington State's version of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 5.

were what would be sought on the website [Petition Appendix pp. 4-5]. It observed that the data was initially obtained from Washington State sources and the alleged defamation concerned the Washington activities of a Washington resident. Finally, as the Ninth Circuit observed, the brunt of harm suffered by Assured would be suffered where Respondent is incorporated and where it has its principal place of business and where its reputation is likely to have been injured [Petition Appendix p. 5].

These key facts are either not included in Petitioner's Statement of the Case or are recast in a misleading manner. For instance, Petitioner asserts that its ratings are based on data from the federal government [Petition p. 3], neglecting to inform the Court that the data is collected in the first instance by Washington State Department of Health surveyors.

Petitioner also includes a paragraph referring to a "user agreement" stating that actions to enforce the agreement must be brought in the courts of Colorado [Petition p. 3]. Petitioner fails to inform the Court that it brought an action in state court in Colorado against Assured to force Assured to litigate this matter in state court in Colorado. The Colorado trial court dismissed Petitioner's complaint. Petitioner appealed to the Colorado Court of Appeals, which upheld the decision of the trial court in a not-for-publication opinion *Healthgrades, Inc. v. Northwest Healthcare Alliance, Inc. d/b/a Assured Home Health & Hospice*, 2002 WL 1839278 (Colo. App.).

Finally, Petitioner asserts that Assured contends that any effort to rate home healthcare providers according to government data is improper [Petition p. 3]. This is an incorrect statement. Respondent asserts only that the data

being collected by Washington State Department of Health surveyors at the time this suit was initiated is inappropriate for the grading which Petitioner has done. [9th Cir. ER 000207-208.]

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS NOT ARTICULATED ANY REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"A Petition for a Writ of Certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Petitioner urges this Court consider this issue as a "crucial constitutional question." [Petition p. 5]. Petitioner ignores the fact that this Court has already provided in *Calder v. Jones*, 465 U.S. 783 (1984), the jurisdictional test that the Ninth Circuit must follow and did follow. Indeed, Petitioner cites approvingly the very language of *Calder* which is relevant in this matter [Petition p. 6].

Obviously, Petitioner does not advocate overruling or modifying *Calder*. Petitioner is simply unhappy that the Ninth Circuit correctly applied *Calder* to the undisputed facts below.

Petitioner claims there is a split of authority between the Ninth Circuit and other Courts of Appeal; this claim is, in fact, incorrect. Courts have come to different conclusions on the issue of personal jurisdiction simply because the facts are different in different cases.

And, finally, Petitioner ignores the fact that the Ninth Circuit's ruling has virtually no precedential value since it was a not-for-publication opinion. This is hardly a compelling reason for review.

The Ninth Circuit applied the appropriate standard, i.e., the *Calder* test. Consequently, review of this case would not establish new law. Thus, there is no compelling reason for this Court to review the Ninth Circuit's opinion.

II. THE NINTH CIRCUIT CORRECTLY APPLIED *CALDER* TO THE FACTS BELOW

The Petitioner incorrectly argues that the Ninth Circuit "rejected the minimum contacts analysis of *Zippo Mfg. Co. v. Zippo.com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)." [Petition p. 5.] In fact, the Ninth Circuit's opinion confirms that the Ninth Circuit has, thus far, endorsed two tests for determining whether an out-of-state Internet website operator's activities amount to purposeful availment of the forum state in the context of personal jurisdiction: the *Zippo* "sliding scale" test and the *Calder* "effects" test. [Petition Appendix pp. 3-4]. As the Ninth Circuit correctly pointed out, the *Calder* "effects test" is employed where the claimed harm sounds in tort [Petition Appendix p. 4].

Because the Respondent's claims sound in tort, the Ninth Circuit correctly applied *Calder* and found a basis for personal jurisdiction on the following grounds: Petitioner had intentionally gathered information on Respondent and other Washington state Medicare-certified home healthcare agencies; that information was developed by Washington State Department of Health surveyors; the so-called "rating" which Healthgrades undertook was a comparison of Washington state Medicare-certified home healthcare agencies against each other; the most likely users of the ratings that affect Respondent are Washington state consumers; the alleged defamation concerned the Washington activities of a Washington resident; and that the damages, if any, or the brunt of the harm suffered by Respondent

occurred in Washington state where Respondent is incorporated, has its principal place of business, and where its reputation is likely to be injured [Petition Appendix pp. 4-5].

III. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS

The cases cited by Petitioner do not demonstrate a split of authority among the circuits. Rather, they confirm that the circuits cited, in cases where the claims are tort-based, have applied the *Calder* test to their specific facts. The outcomes have depended on the facts of the particular cases. *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), was an Internet defamation case involving a claimed cover-up and conspiracy involving the plaintiff who was then Associate Deputy Director of the FBI. The Fifth Circuit took issue with the notion that defendant must have known that the harm of the article would have its effect in Texas where the plaintiff resided. It observed that the article was not expressly aimed at Texas. Indeed, there was no reference to Texas or the Texas activities of the plaintiff. Texas was not the focal point of the article or the harm suffered.

In *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994), *cert. den.*, 513 U.S. 962 (1994), a world-class runner who resided in Ohio took exception to a drug test which was administered in Monaco where the race was held. The laboratory which did the analysis was located in Paris. The defendant was not a U.S. resident and had no U.S. office. The plaintiff's claims included breach of contract, defamation and tortious interference with business expectancy. With respect to the tort claims, the Sixth Circuit applied the *Calder* test and noted the following facts in rejecting personal jurisdiction by the

Ohio courts: The alleged tortious activities took place in Monaco and Paris; the plaintiff was an international world-class athlete whose reputation was not centered in Ohio; defendant did not disseminate any of the allegedly defamatory materials in Ohio – Ohio periodicals simply picked up the story; Ohio was not the focal point of the press releases.

Remick v. Manfredy, 238 F.3d 248 (3rd Cir. 2001), involved as one claim, misrepresentation of plaintiff's image through an Internet posting where there was no specific aiming at the forum state. Personal jurisdiction was denied using the *Calder* test. Similarly, *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), involved a suit brought in Virginia by a Virginia prison warden claiming defamation in articles printed in local Connecticut newspapers which were also posted on the Internet. In rejecting Virginia jurisdiction, the Fourth Circuit pointed out that the two newspaper websites were designed to serve their local Connecticut readers and not to attract a Virginia audience. The Court also pointed out that the focus of the article was on the Connecticut state prisoner transfer policy and not on the Virginia warden.

ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002), involved a tenuous copyright infringement claim against an Internet service provider for enabling infringement by one of its subscribers. The Court found no activities of defendant directed at the forum state and rejected personal jurisdiction.

Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2nd Cir. 1997), is likewise inapposite. It involved a trademark infringement claim against a Missouri nightclub's use of an Internet website using its name which was also the name of

a New York nightclub. Not only did the outcome of that case revolve around the peculiarities of New York's Long-Arm Statute, CPLR §§ 302(a)(2) and (a)(3), which is more restrictive than Washington's, but there the website was clearly aimed at patrons who might frequent the Missouri nightclub and was not targeting New York residents. In that respect, the case is quite similar to the *Young* case.

In short, Petitioner has simply cited a few cases which have found a lack of jurisdiction using the *Calder* analysis. In none of the cases, however, is the factual nexus with the forum state anywhere close to the nexus which the Ninth Circuit correctly observed in this case.

IV. PETITIONER HAS COMPLETELY MISCONSTRUED THE "SLIDING SCALE" TEST

Petitioner suggests that if the Ninth Circuit applied the "sliding scale test" which was endorsed in *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), the result would be different, or that the *Calder* effects test is not appropriate as an analytical tool in this case. Neither suggestion is accurate or warranted. As the Fifth Circuit observed in the *Revell* case, *supra*, the *Zippo* "sliding scale" test is not in tension with the effects test of *Calder*. 317 F.3d at 471-72. The Ninth Circuit did not "reject" the "sliding scale" analysis; it simply found the effects test of *Calder* to be appropriate for analyzing the tort-based claims in this case. Using either test, there is more than enough nexus with Washington state beyond merely publishing a general purpose website. Thus, this argument, too, raises no compelling reason for this Court to review this matter.

CONCLUSION

Because Petitioner has not presented any compelling reason for this Court to exercise discretionary jurisdiction over the Ninth Circuit's ruling, the Petition should be denied.

Respectfully submitted,

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